DOCKET FILE COPY ORIGINAL

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885
(202) 872-6700
CABLE: "ARFOPO"
FAX: (202) 872-6720
TELEX: 89-2733

PARK AVENUE TOWER
65 EAST 55TH STREET
NEW YORK, NEW YORK 10022-3219
(212) 750-5050

1700 LINCOLN STREET
DENVER, COLORADO 80203-4540
(303) 863-1000

WILLIAM E. COOK, JR.
DIRECT LINE: (202) 872-6996

February 11, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Rate Regulation, MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed, on behalf of the City of New York, an original and nine copies of reply comments filed as part of the Commission's proceeding in MM Docket No. 92-266.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

REPLY COMMENTS OF THE NEW YORK CITY DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

I. INTRODUCTION

On December 10, 1992, the Federal Communications Commission ("Commission") adopted a Notice of Proposed Rulemaking in this proceeding, proposing, among other things, to prescribe guidelines for regulating cable service rates as mandated by Section 3 of the Cable Television Consumer Protection and Competition Act of 1992.1/

In these reply comments, the New York City Department of Telecommunications and Energy ("City of New York" or "City") strongly urges the Commission to adopt effective rate regulation guidelines as recommended by Local Governments in their comments.2/ Any other action would render core provisions of

---

1/ Pub. L. No. 102-385, 102 Stat. 1460 (1992)(hereinafter "1992 Cable Act").

2/ See Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors and the National Association of Counties (hereinafter "Local Governments"), dated January 27, 1993, in MM Docket No. 92-266; Reply Comments of Local Governments, dated February 11, 1993, in MM Docket No. 92-266.

the 1992 Cable Act meaningless and continue to subject the residents of New York City to unreasonably high costs for cable service.

Specifically, the City of New York supports the recommendations of Local Governments that the Commission: (1) adopt easily administrable national benchmark rates; (2) eliminate the monopoly component of current cable rates; and (3) prevent evasions by rolling back all cable rates nationwide to the rates in effect prior to passage of the 1992 Cable Act.

In these reply comments, the City also addresses the issue of bulk rate offerings in response to the comments of Liberty Cable Company, Inc. The City requests that the Commission clarify that the Act does not prohibit all bulk rate offerings.

II. DISCUSSION

A. The Commission Must Adopt Meaningful and Effective Rate Regulation Guidelines

Virtually every year since the rate deregulation provisions of the 1984 Cable Act went into effect, New York City cable subscribers have faced rate increases. Two of the largest systems in New York which together serve 450,000 subscribers -- Time Warner Cable of New York City in the Southern portion of Manhattan and Paragon Cable Manhattan in the Northern portion of Manhattan -- have increased rates three times during the last two and a half years. As in many other parts of the country, monthly cable rates in Manhattan have increased over twice as much as the Consumer Price Index since rate deregulation. In 1984, cable service was available for $9.75 a month. Today, the lowest price basic service tier costs $14.95 a month. Monthly

rates for standard cable service have increased over 30% since 1986.

Charges for additional outlets have increased similarly. The charge for an additional outlet for the standard service tier was $6 in 1986. Today, following the recent Time Warner rate increases, the charge for an additional outlet for the standard service tier is $9.00.

After each rate increase, consumers have complained bitterly to the City that they have no choice other than to "accept" the increase. For example, in a recent such complaint to the City, a consumer stated: "We are locked in with this company and can do nothing to switch." In many areas of the City, residents cannot receive over-the-air television broadcast signals without subscribing to and paying monopoly rates for cable service, and there are no other multichannel video programming distributors offering comparable programming to these residents.

The Commission must adopt rate regulation guidelines which will in practice ensure reasonable rates. The City therefore urges the Commission to carefully consider and adopt the recommendations of Local Governments. Local Governments urge fair but tough national standards and a strong partnership between local franchising authorities and the Commission in implementing those standards.

The City supports the recommendation of Local Governments that the Commission should adopt a benchmark rate model that produces a per channel rate of approximately 34 cents per channel. Such a model would be easily administered and would, as Local Governments note, eliminate the monopoly component of current cable rates.

The City strongly believes that the Commission must focus not only on rates for primary outlets but on rates for additional outlets. The City supports the recommendation of Local Governments that rates for connecting additional television sets should be based on actual costs.3/

Should the Commission permit cable operators, as some commenters argue, to cite particular cost circumstances to justify rates exceeding the benchmark rate, the Commission must be careful if it permits operators to include increases in programming expenses. Specifically, the City urges the Commission to exclude from such adjustments, increases in costs for programming obtained by operators from affiliated companies. The Commission is familiar with the potential for abuse arising from transactions among affiliated companies.4/

The adoption of an accurate test for measuring effective competition also is critical if we are to assure consumers reasonable rates. As argued by Local Governments, effective competition should be measured in an operator's service area. To do otherwise, would permit operators to avoid regulation by wiring less than their franchise areas. In addition, a multichannel video programming service must be actually available to a household before it can be considered as "offered" to the household.

Consumers in New York are particularly puzzled by Time Warner's recent rate increase in light of the 1992 Cable Act

---

3/ See Comments of Local Governments at 50-51.

4/ See, e.g., New York Telephone Company (Consent Decree Order), 5 FCC Rcd 5892 (1990); New York Telephone Company (Order to Show Cause and Notice of Apparent Liability for Forfeitures), 5 FCC Rcd 866 (1990).

passed by Congress to prevent, as one consumer recently characterized it, the "persistent" practice of unreasonable rate increases for necessary services. The City urges the Commission to prevent evasions by rolling back all cable rates nationwide to the rates in effect prior to passage of the 1992 Cable Act.

The Commission has the opportunity at this time, indeed the mandate, to protect consumers from pricing abuses. We urge the Commission to adopt the proposals of Local Governments in this proceeding, and give to franchising authorities the tools required to assure consumers reasonable rates.

B. The Commission Should Clarify that the Act Does Not Prohibit all Bulk Rate Offerings

Under Section 623(d) of the Communications Act, cable operators are required to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." In its comments, Liberty Cable Company, Inc. ("Liberty") suggests that all bulk rate offerings are prohibited under that uniform rate structure provision. The City disagrees.

Liberty correctly notes that Congress adopted the requirement to "prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."5/ Section 623(d) specifically restricts an operator from "having different rate structures in different

---

5/ See H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) (hereinafter "Conference Report") at 59, 65; S. Rep. No. 92, 102d Cong., 1st Sess. (1991) (hereinafter "Senate Report") at 76.

parts of one cable franchise."6/ However, as the Commission notes:

> We do not interpret the statutory mandate for uniform rate structures as precluding reasonable discriminations in rate levels among different categories of customers provided that the rate structure containing such discriminations is uniform throughout a cable system's geographic service area.7/

The uniform rate structure provision does not prohibit bulk offerings available throughout the franchise area. The provision requires a uniform rate structure throughout the franchise area, but does not require uniform rates. The City requests that the Commission clarify that the Act does not prohibit all bulk rate offerings.

The City also disagrees with Time Warner's position that the uniform rate structure provision does not bar an operator from individually negotiating for service to multiple dwelling unit ("MDU") buildings such as apartment buildings. The company's "meeting competition" argument notwithstanding, the Act specifically requires a uniform rate structure.

Finally, the City takes issue with Liberty's suggestion that we recently approved a Bulk Rate Plan submitted by Time Warner on the basis that Time Warner pays a franchise fee to the

---

6/ Senate Report at 76.

7/ Notice of Proposed Rule Making (FCC 92-544) at para. 113.

City.8/ On the contrary, the City carefully reviewed the plan to ensure that the proposed bulk rate offering would not create unfair and discriminatory pricing distinctions, would not allow building owners to profit inappropriately by "marking up" cable charges and otherwise would be in the public interest.9/

8/ Liberty, as noted in its comments, has challenged our action before the New York State Commission on Cable Television ("CCT"), and submitted its petition to the CCT and a similar petition filed with the CCT by John L. Hanks as exhibits to its comments in this proceeding. To complete the record, attached hereto are the City's replies to the petitions of Liberty and John L. Hanks (without exhibits).

9/ Liberty's comments are replete with inaccurate statements concerning the approved Bulk Rate plan. Liberty, for example, states that it "is not known whether Time Warner will offer the new bulk rate to any other multi-unit dwellings." The Bulk Rate plan approved by the City specifically requires Time Warner to offer bulk rates to all buildings in the franchise area that contain fifteen or more units. All eligible buildings must be notified of the offering within 180 days of the date the City approved the plan, that is, by May 17, 1993.

III. CONCLUSION

The City of New York respectfully urges the Commission to adopt the proposals advanced by Local Governments in this proceeding. We believe Commission adoption of these proposals will best serve the Congressional objective of assuring consumers reasonable cable service rates.

Respectfully submitted,

NEW YORK CITY DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

By: Eileen E. Huggard

Eileen E. Huggard
Assistant Commissioner
Cable Television Franchises
and Policy
75 Park Place
Sixth Floor
New York, New York 10007
(212) 788-6540

Dated: February 11, 1993

ATTACHMENT

NEW YORK STATE COMMISSION ON CABLE TELEVISION

----------x

IN THE MATTER OF PETITION FOR DECLARATORY RULING ON THE INSTITUTION OF SELECTED BULK RATES BY TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN	REPLY IN OPPOSITION TO PETITION Docket No.

----------x

REPLY IN OPPOSITION BY THE CITY OF NEW YORK

The City of New York ("City") hereby respectfully submits its Reply in Opposition to the above-referenced "Petition for Declaratory Ruling" filed with the New York State Commission on Cable Television ("Commission") by Liberty Cable Company, Inc. ("Liberty").

I. INTRODUCTION

The existing cable television franchise agreements (the "Franchise Agreements") between the City and Manhattan Cable Television (now a division of Time Warner Entertainment, L.P.) and Paragon Cable Manhattan (the "Franchisees"), expressly provide for the establishment of bulk rate arrangements. The procedures for the establishment of such arrangements are set forth in Sections 5.3 and 5.4 of the Franchise Agreements. In accordance with such procedures, and after careful consideration, the City's Commissioner of Telecommunications and Energy (the

"Commissioner")[1], by letter dated November 18, 1992, accepted an Amended Bulk Rate Proposal[2] submitted by the Franchisees, conditional on the Franchisees agreeing (as they subsequently did) to certain further changes to the proposal (as thus amended, said proposal is referred to hereinafter as the "Proposal").

In its petition dated December 17, 1992, Liberty claims that the Proposal, although specifically contemplated in the Franchise Agreements, constitutes an amendment of the Franchise Agreements, requiring approval of the Commission. Liberty also requests a plenary proceeding to determine if the Proposal is illegally discriminatory. The City believes that both Liberty's claim and its request for a proceeding should be denied.

II. DISCUSSION.

1. The Proposal is not a Franchise Amendment.

Section 5.4 of the Franchise Agreements states that "the Company may utilize bulk rate arrangements" when approved by the Commissioner. Section 5.4 specifically sets forth the procedures and grounds for such approvals, which procedures and grounds were precisely followed in presenting and approving the Proposal. An approval, specifically contemplated by the

---

[1] The Commissioner is the successor to the "Director" referred to Sections 5.3 and 5.4 of the Franchise Agreements.

[2] This proposal was known as the "Amended Bulk Rate Proposal" because it was a revised version of an earlier proposal, with amendments specifically incorporated to meet City requirements.

Franchise Agreements, of a bulk rate arrangement, itself specifically contemplated by the Franchise Agreements, is an implementation of, not an amendment to, the Franchise Agreements. Liberty suggests, in numbered paragraph 10 of its petition, that the Proposal violates subsection 1 of §825 of the New York State Executive Law. Liberty quotes subsection 1 but omits the most relevant language thereof: "the franchise ... may establish or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories." The Franchises, in accordance with this provision, provide for the establishment of reasonable classifications.

The Proposal does not set or change rates. As the Commission is aware, federal law currently prohibits the City from regulating most cable rates.[3] The Proposal merely establishes a reasonable classification or category as expressly permitted by Executive Law §825. The Proposal, in short, does not constitute nor does it require, an amendment of the Franchise Agreements.

2. A Plenary Proceeding is Unnecessary. The Proposal, attached hereto as Exhibit A, is essentially self-explanatory. Bulk rate agreements of the type permitted by the Proposal are widely used throughout the United States, and are

[3] Some local authority over rates will emerge from pending FCC proceedings pursuant to the Cable Television Consumer Protection and Competition Act of 1992, but such authority is not yet effective.

not generally considered illegal or improper discrimination.[4] Indeed such agreements were common in Manhattan prior to 1990. The language of the 1990 Franchise Agreements was clearly not intended to prohibit such agreements but only to insure that they were offered in accordance with a reasonable and consistent plan.

The franchise restrictions reflect concerns that bulk rate agreements may create unfair pricing distinctions, and might allow building owners to profit inappropriately by "marking up" cable charges. The City carefully reviewed the Franchisees' bulk rate plan to ensure that the these concerns were satisfied and that the plan was in the public interest. On the basis of that review, the City conditioned its approval of the plan on agreement by the Franchisees to additional terms which would ensure widespread and non-discriminatory availability of the bulk rate option. Specifically, the City required that bulk rate agreements be offered not on an arbitrary basis but to all multiple dwelling buildings with fifteen or more units (buildings containing more than 85% of the homes passed in Manhattan). The Proposal also prohibits bulk rate building owners from charging residents in excess of the prevailing rate for cable service.

The plan, as amended by the Franchisees and approved by the City, clearly satisfies the concerns underlying the

---

[4] Because the additional income resulting from increased penetration in bulk buildings tends to offset the cost of offering the bulk discount, non-bulk subscribers do not subsidize the bulk discounts. Indeed, additional profits resulting from bulk arrangements may help keep rates down for all subscribers, including non-bulk subscribers.

franchise agreement restrictions on bulk rate arrangements, and is in the public interest. The commission should dismiss Liberty's accusation of prohibited discrimination. A plenary proceeding is inappropriate.

III. CONCLUSION.

In conclusion, the City's approval of the Franchisees' Amended Bulk Rate Proposal clearly is not an amendment to the Franchise Agreements, and the Proposal does not violate State law. The Commission should summarily deny Liberty's Petition for Declaratory Ruling and its request for a full plenary proceeding.

Respectfully submitted,

The City of New York

Eileen Huggard
Assistant Commissioner
Cable Television Franchises
and Policy
Department of Telecommunications
& Energy
75 Park Place
New York, New York 10007

Bruce Regal
Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, New York 10007

Dated: January 13, 1993

NEW YORK STATE COMMISSION ON CABLE TELEVISION

IN THE MATTER OF PETITION FOR DECLARATORY RULING ON THE INSTITUTION OF SELECTED BULK RATES BY TIME WARNER CABLE OF NEW YORK CITY AND PARAGON CABLE MANHATTAN

REPLY IN OPPOSITION TO PETITION OF JOHN L. HANKS

REPLY IN OPPOSITION BY THE CITY OF NEW YORK

The City of New York ("City") hereby respectfully submits a Reply in Opposition to a Petition filed with the New York State Commission on Cable Television ("Commission") by Mr. John L. Hanks. By letter dated January 14, 1993, Liberty Cable Company, Inc. ("Liberty") requested that Mr. Hanks' petition be consolidated with Liberty's earlier petition regarding the same matter. The City has previously replied to Liberty's petition. Mr. Hanks' petition is hereinafter referred to as the "Consolidated Petition" and Liberty's petition as the "Original Petition." The term "Proposal" as used herein refers to the bulk rate proposal approved by the City and attached to the City's previous reply as Exhibit A.

I. INTRODUCTION

Much of the material in the Consolidated Petition restates claims made in the Original Petition, to which the City has previously responded. However, the Consolidated Petition

raises several additional matters the City's response to which the Commission may find helpful.

II. DISCUSSION

1. The Proposal Does Not Violate Federal Law. The Consolidated Petition claims that the Proposal violates certain federal statutory provisions. The provisions cited however do not prohibit bulk arrangements offered in accordance with the Proposal.

The new negative option billing provision[1] does not prohibit such bulk arrangements. The new provision states that "a cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." Under the bulk arrangements described in the Proposal, cable operators would not charge individual unit owners for bulk services. Rather, the building owner or manager (who will have affirmatively requested the service) will be charged. It does not appear that the negative option billing prohibition was ever intended to affect bulk service arrangements.

Similarly, the new uniform rate structure provision[2] does not prohibit bulk offerings as described in the Proposal. The Proposal, by requiring that the bulk option be offered throughout the franchise areas to all multiple dwellings meeting the minimum fifteen unit criteria, imposes a uniform rate

---

[1] Subsection (f) of Section 623 of the Communications Act of 1934 (47 U.S.C. §543) as amended by Section 3(a) of the Cable Television Consumer Protection and Competition Act of 1992.

[2] Ibid., subsection (d).

structure throughout the cable system's service area. Perhaps the offering of bulk rate arrangements on an ad hoc basis, entirely at the discretion of the cable operator (as was previously practiced in Manhattan) may be inconsistent with the new uniform rate provision. But bulk rates offered under the strict requirements of uniformity imposed by the Proposal are entirely consistent with the new provision. It should be noted in this regard that the provision does not require "uniform rates" but a "uniform rate structure", which is precisely what the Proposal provides.

Nor do cable TV bulk rate arrangements appear to represent illegal tying in violation of antitrust law. The City is unaware of any legal precedent for a claim that cable TV bulk billing represents illegal tying, despite the fact that cable bulk billing is widely used around the country. Building owners provide many services on a bulk basis that could be and often are purchased by unit owners individually: window washing, air conditioning, parking, gas and electricity, and master antenna television service are merely a few examples. Bulk provision of cable TV service does not appear to the City to be significantly different, for tying analysis purposes, from the widely accepted bulk provision of these other types of services. The City also notes that Liberty itself would likely disagree with the Consolidated Petition on this tying issue. Indeed, the City understands that a substantial portion of the business of many alternative video service providers, such as Liberty, is based on

bulk arrangements. If such arrangements were to be prohibited by antitrust law, the ability of such providers to compete with franchised cable operators could be seriously diminished.

2. The Proposal was Approved in Full Accordance with the Franchise Agreements. The Consolidated Petition claims that it was Mr. Hanks' intention, when he negotiated the Manhattan franchise agreements on behalf of the City (as the City's then Director of the Bureau of Franchises), that bulk rate proposals such as the Proposal would be reviewed under broader City procedures than those used to review the Proposal. With all due respect to Mr. Hanks, his recollection of intention is directly inconsistent with the express language of the franchise agreements themselves, and the latter must prevail. There are many provisions in the Manhattan franchise agreements which specifically require City review procedures beyond internal agency review, but the bulk rate provision is not one of them. The bulk rate provisions clearly and unambiguously give sole review authority to "the Director" (now the Commissioner of Telecommunications and Energy, referred to hereinafter as the "Commissioner"). Mr. Hanks' recollection, although undoubtedly expressed in good faith, is directly inconsistent with the specific language of the franchise agreements, which must prevail.

III. CONCLUSION

In reviewing the bulk rate proposals that were presented to it, the City reviewed all of the public policy

issues which are raised in the Consolidated Petition, and other relevant issues as well. After lengthy and careful review, the Commissioner, acting in full accordance with franchise agreement requirements, determined that, on balance, the Proposal was in the public interest. The City also reviewed the legal implications of the Proposal and determined that the Proposal did not violate existing law. The City believes that the Commissioner's determination was within the scope of the City's and the Commissioner's authority (as further discussed in the City's previously submitted reply to the Original Petition), and that the relief sought in the Consolidated Petition, and the Original Petition, should be denied.

Respectfully submitted,

The City of New York

David Bronston
General Counsel
Department of Telecommunications
& Energy
75 Park Place
New York, New York 10007

Bruce Regal
Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, New York 10007

Dated: January 29, 1993